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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether the court of appeals properly concluded that the collateral estoppel doctrine of the Double Jeopardy Clause of the United States Constitution foreclosed the Government's relitigation of an issue necessarily determined in the Respondent's favor by a jury in a prior acquittal of related offenses.

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COUNTERSTATEMENT OF THE CASE

Respondent was convicted on October 7, 1987 in the U.S. District Court for the Middle District of Pennsylvania on one count of possessing an illegally made automatic weapon, in violation of 26 U.S.C. 5861(c); one count of possessing an unregistered automatic weapon in violation of 26 U.S.C. 5861(d); one count of conspiracy to falsify firearms transaction records required by federal law, in violation of 18 U.S.C. 371; and two counts of falsifying firearms transaction records, in violation of 18 U.S.C. 924(a). The Third Circuit Court of Appeals upheld Respondent's convictions of counts one and two and reversed and remanded the convictions on the last three counts holding that the doctrine of collateral estoppel should have been applied to exclude harmful evidence from Respondent's trial. (App., infra 1a-30a).

The Court also noted that the facts suggested and the Government conceded that the same activity, acquisition of firearms, gave rise to both Respondent's trial in New York on conspiracy charges and his separate trial in Pennsylvania on the substantive firearm counts presenting the question as to whether Respondent was subjected to separate or multiple prosecutions for the same activity/offense in violation of the Double Jeopardy Clause of the Fifth Amendment. (App. infra 29a)

On April 9, 1984, Respondent was indicted in the Southern District of New York, a/k/a James M. Hamilton and Randall C. Thomas as one of nineteen co-defendants in U.S. v. Badalamenti, No. SS 84

District of Pennsylvania returned a 7-count indictment against Respondent charging him with (1) possession of an illegally made firearm in violation of 26 U.S.C. 5861(c); (2) possession of an unregistered firearm in violation of 26 U.S.C. 5861(d); (3) transfer of the illegal, unregistered weapon in violation of 26 U.S.C. 5861(e); (4) conspiracy to falsify firearm records in violation of 18 U.S.C. 371; and (5) three counts of falsifying firearm records utilizing the fictitious names James Hamilton, Randall Thomas, and Roger Hall in violation of 18 U.S.C. 924(a).

On March 15, 1985 Respondent was acquitted by a Pennsylvania jury of the third count involving transfer of an illegal, unregistered weapon and found guilty on the remaining six counts, and immediately incarcerated until sentencing. On April 15, 1985, he was sentenced to an aggregate term of imprisonment of 20 years.

In October 1985, Respondent went on trial in the Southern District of New York along with 18 co-defendants in the case of U.S. v. Badalamenti, supra. During the course of that trial, which lasted 17 months, the Third Circuit reversed the Pennsylvania weapons convictions on September 9, 1986 because the trial court committed error during voir dire. U.S. v. Salamone, 800 F.2d 1216 (3rd Cir. 1986). Although Respondent's convictions were overturned, and he had no other record of any charges or convictions, he was denied bail by the Pennsylvania District Court to await his retrial and remained imprisoned for the balance of the Badalamenti trial.

On March 2, 1987, the jury finally reached its verdict in the

falsify federal firearms records and the two counts of using fictitious names James Hamilton and Randall Thomas to buy the MACs. He was acquitted of the final count of falsifying federal firearms records in the name of Roger Hall. Respondent was sentenced on October 30, 1987 to an aggregate term of 16 years consecutive to the 5 year term imposed in Badalamenti.

The Respondent appealed his convictions to the Third Circuit Court of Appeals raising the issues of multiple, fragmented prosecutions barred by Double Jeopardy and, alternatively harmful evidence of acquitted crimes admitted in violation of collateral estoppel principles. Other issues were also presented and found lacking in merit by the Court but for the issues of prejudicial evidence excludable under Fed. R. Evid. 403 and objections to the unjustifiably harsh sentence imposed two days before the effective date of the new Federal Sentencing Guidelines which would have mandated a total sentence of 30 to 36 months. (App., infra 13a n.10, 30a n.27).

The Court of Appeals reversed Respondent's convictions on the conspiracy and substantive firearms records falsification charges and let stand the convictions on the illegal weapon possession counts subject to resentencing. (App., infra 30a). The question as to whether Respondent was subjected to separate or multiple prosecutions for the same activity/offense in violation of the Double Jeopardy Clause of the Fifth Amendment, the Court noted, was suggested by the facts, however was not decided because the Respondent, on appeal, relied exclusively on the collateral

testimony regarding certain telephone calls,[1] because in introducing this evidence the government sought to relitigate Respondent's participation in the Badalamenti narcotics conspiracy, despite his acquittal of such participation in New York.

No fair interpretation of the government's intention to produce this specific evidence could conclude otherwise that it was a direct attempt by the prosecution to re' y Respondent as a member of the conspiracy - a charge for which he had already been acquitted by a jury. In reviewing the purpose of the prosecutor in presenting this evidence before the jury in this case, the Third Circuit Court examined his explanation during Respondent's challenge to exclude it under Fed. R. Evid. 403.

> "I think that it's necessary to bring in these surveillance and these toll records to show these firearms just didn't drop out of the sky at these other two locations, that there's some connection between these people and we think that it shows the motive of the defendant for falsifying the forms in connection with the Hamilton, Thomas and Hall purchases, which the government maintains he did. The motive being that he had some understanding that these, you know, were going to be used for some nefarious purposes which we won't specify which we won't argue but that there obviously was some purpose that they ended up secreted in attics and some reason that they were found secreted in attics. They

[1] The Solicitor General in his reasons for granting the petition for writ of certiorari appears to place great weight on the fact that Respondent, at trial, stipulated to the questioned phone calls. (Petition, p. 8). Of course, as the court of appeals recognized, the fact that these phone calls were indeed made was stipulated to by Respondent, but, only after Respondent's motion to exclude them on collateral estoppel grounds was denied. (App., infra, 21a, n. 16).

REASONS FOR DENYING THE WRIT

1. Contrary to the Petitioner's contention, the instant case does not present the questions involved before the Court in Dowling v. United States, No. 88-6025. Although that case as well arose from the Third Circuit, it involves two separate issues distinct from the question raised here in the request for discretionary review of this Court.

In Dowling, the primary question considers whether the court of appeals significantly extended the collateral estoppel principles enunciated by this Court in the landmark decision of Ashe v. Swenson, 397 U.S. 436 (1970) to limit the evidence that may be admitted to prove an offense "that is entirely separate from the one of which the defendant has been acquitted." (Resp. Br. at 11, Question Presented No. 1, Dowling v. U.S., supra)[2]. Where as here, the only question is whether the court of appeals properly concluded that the collateral estoppel doctrine of the Double Jeopardy Clause of the U.S. Constitution foreclosed the government's relitigation of an issue necessarily determined in the Respondent's favor by a jury in a prior acquittal of related offenses.

Assuming arguendo, that the Third Circuit in Dowling, improperly extended the holding of Ashe beyond the scope of its

[2] The second question raised in Dowling that the admission of evidence excludable by collateral estoppel was harmless error has never been raised by the Government in this case, nor is it even suggested by the Solicitor General in his petition. Nevertheless the court of appeals found the reversible error was not harmless. (App., infra 27a).

Hess v. Medlock, 820 F.2d 1368, 1373-74 (4th Cir. 1987); FIFTH CIRCUIT: Wingate v. Wainwright 464 F 2d 209 (5th Cir. 1972); De La Rosa v. Lynaugh, 817 F.2d 259 (5th Cir. 1987); SIXTH CIRCUIT: Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1988); SEVENTH CIRCUIT: "Government is precluded by collateral estoppel to relitigate issues necessarily determined by jury in prior acquittal" U.S. v. Gentile, 816 F.2d 1157 (7th Cir. 1987); EIGHTH CIRCUIT: "Collateral estoppel would foreclose issue resolved in the defendant's favor by acquittal." Flittie v. Solem, 775 F.2d 933, 939 (8th Cir. 1985); NINTH CIRCUIT: "Under the doctrine of collateral estoppel, also known as issue preclusion, 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.'...It is true that the doctrine of collateral estoppel is not to be applied so narrowly in criminal cases that it operates unfairly to the accused." citing with approval Ashe v. Swenson. U.S. v. Kayto, 868 F.2d 1020, 1021-22 (9th Cir. 1988); see also U.S. v. Lasky, 600 F.2d 765 (9th Cir. 1979); ELEVENTH CIRCUIT: U.S. v. Gornto, 792 F.2d 1028 (11th Cir. 1986); DISTRICT OF COLUMBIA: U.S. v. Day, 591 F.2d 861 (D.C. Cir. 1978). See also Note, The Double Jeopardy Clause as a Bar to Reintroducing Evidence 89 Yale L.J. 962 (1980).

It can be seen therefore that Respondent did not prevail before the Third Circuit by successfully arguing any extension of or departure from the fundamental standards set forth in Ashe. Instead, in a detailed analysis, the court of appeals carefully

in the defendant's favor in the first case. This proposition eviscerates the sound, fundamental principles of collateral estoppel established by this Court in Ashe, and flies in the face of the litany of court decisions that have addressed this issue.

The instant case highlights the fatal flaw of the Government's reasoning. Here, the Respondent was acquitted of utilizing fictitious names to secure weapons for the purpose of supplying them to individuals involved in a narcotics conspiracy. The jury in New York did not necessarily determine that Respondent didn't utilize fictitious names to secure weapons, but it did necessarily determine that if he did so, it was not with the intent of providing them to the members of the conspiracy. The Government in this case wanted to show the motive of Respondent for using false names to buy guns. Motive might be an important factor in this case, indeed it might be a significant and substantial matter for the jury to consider, however, it is not an essential element of the substantive offenses and therefore need not be proven beyond a reasonable doubt. According to the Government's theory, it would have unrestricted license to relitigate the issue that Respondent's motive for buying the guns under false names was to provide them to members of the other conspiracy. What greater example of repeated, harassing prosecution and unconscionable abridgment of the Respondent's constitutional protections afforded by the fundamental principles of collateral estoppel.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5803

UNITED STATES OF AMERICA,

Appellee

v.

SALVATORE SALAMONE,

Appellant

On Appeal from the United States District Court
for the Middle District of P[illegible]lvania
Criminal No. 84[illegible]

Argued January [illegible]989

BEFORE: GIBBONS, Chief Judge,
and SEITZ and GREENBERG,
Circuit Judges

(Filed March 6, 1989)

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sections of Titles 18 and 21 of the United States Code. Count one alleged that in furtherance of the conspiracy, Salamone had ". . . obtained, possessed, stored, concealed, transported and otherwise utilized firearms . . . ." It was charged that as overt acts in furtherance of the conspiracy, Salamone purchased a number of semi-automatic handguns, colloquially known as "MACs," using the fictitious names James Hamilton and Randall Thomas. *Badalamenti* indictment, ¶¶ 533-35. The indictment further alleged as overt acts Salamone's receipt of seven Colt semi-automatic rifles, Model AR-15; three Uzi-A model semi-automatic rifles; and a Ruger semi-automatic rifle. *Badalamenti* indictment, ¶¶ 531-32. Count sixteen charged that Salamone and various others participated in a racketeering enterprise; that they were members of an organization known as "La Cosa Nostra" or "the Mafia," the purpose of which was enrichment from narcotics trafficking through the methods and means set forth in count one, in violation of various sections of Titles 18 and 21 of the United States Code. Significantly, Salamone was not charged in the Badalamenti indictment with any substantive firearms offenses.

Salamone was convicted by the New York jury on the money laundering conspiracy and substantive money laundering counts, but acquitted on counts one and sixteen -- the drug trafficking conspiracy and racketeering counts.[2]

In October 1984, an indictment was returned against Salamone in the Middle District of Pennsylvania, charging him with a variety of firearms offenses in violation of federal law. Counts one and two

2. Although it convicted Salamone on the money laundering counts, the jury, as reflected by the verdict form, found that he had not committed these offenses in furtherance of a violation of the federal drug laws.

gun counts, and evidence involving counts four through seven, the counts involving the purchasing of MACs in fictitious names. With respect to the former, the government sought to establish that Salamone bought a semi-automatic pistol at the Renco Home and Sport Center, Inc., in Bloomsburg, Pennsylvania, and thereafter converted it into a fully automatic weapon, or a machine gun, in violation of federal law. In support of its theory, the government introduced, *inter alia*, the testimony of Douglas Renninger, a Renco employee. Renninger testified that in 1981, Salamone purchased a semi-automatic weapon in his own name, signing the firearm transaction record required by federal law for any firearms transaction involving a licensed dealer,[4] as well as the state form required when purchasing a pistol. Tr. 73-76, 87-88. Renninger further testified that in 1983 Salamone brought the MAC, which had been converted into a fully-automatic weapon, back to Renco to have it fixed because it was not working properly, *i.e.*, it was functioning as a fully-automatic weapon, and that Salamone explained that "the FBI was checking up on him." Tr. 89, 94-96, 103. Daniel Wolfe, another Renco employee, corroborated some of Renninger's testimony in this regard. Tr. 254-56.

Salamone, testifying on his own behalf, admitted that he bought the gun, but claimed that Daniel Jenkins, a Renco employee, had, in 1982, converted it into a fully-automatic weapon without his knowledge. Tr. 1131-34. Dissatisfied with the gun, Salamone brought it back to Renco, again testifying that he was unaware that the gun had been converted into an automatic weapon. Tr. 1154-55, 1227.

The government sought to establish, with respect to the charges involving the purchases of MACs using

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4 *See* 18 U.S.C. § 923(g).

Salamone did not deny buying the MACs, but only disputed the amount of money he owed, and made a payment to settle the account. Tr. 152-53.[6]

The government also introduced testimony of FBI agents who, in executing search warrants, discovered some of the MACs bought in false names at three locations in New Jersey: Sal's Pizza (owned by Sal Greco, not appellant), a Nutley apartment, and Pizza Village. Tr. 720-46. The agents' testimony established that some of the guns for which Salamone had signed federal forms also were found at Sal's Pizza and the Nutley apartment. *Id.*

The government introduced evidence which it describes as connecting "various figures in the 'Pizza Connection' investigation to the site of the three searches" during which MACs were found. Brief at 13 n.11. This evidence consisted of testimony of FBI agents that individuals involved in the Pizza Connection investigation came and left the three sites. Tr. 747-83, 806-16. The government also introduced telephone toll records which it describes as showing "calls between Sal's Place [Salamone's restaurant], Sal's Pizza, and the other places searched and persons observed during the surveillance." Brief at 37; tr. 818-21. The government, though, never identified these individuals as being involved with La Cosa Nostra or the Mafia or with a drug conspiracy.

Salamone testified that he accepted delivery of the CAR-15s and Uzis, but did so on behalf of his brother, Filippo, and that he signed the federal forms believing them to be receipts. Tr. 1168-97. He further testified

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6. The government also introduced, *inter alia*, evidence of what it characterized as self-incriminating statements made by Salamone to Jenkins with respect to falsifying the records when Jenkins was cooperating with federal authorities and wearing a body transmitter, Tr. 322-25, and evidence that Salamone's fingerprints were found on the Hamilton form, Tr. 877-79.

trial, the evidence unequivocally established that three or four robbers had stolen property from each one of the poker players; in dispute was whether the defendant had been one of the robbers. Defendant was acquitted, but thereafter was prosecuted for robbing *another* one of the poker players and was convicted.

The Supreme Court held that the second prosecution was unconstitutional; that collateral estoppel was part of the Fifth Amendment's guarantee against double jeopardy, and that under collateral estoppel principles, the second prosecution was barred. It explained, first, that

> '[c]ollateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443, 90 S.Ct. at 1194. It then held that when applying collateral estoppel principles in criminal cases, a court must

> 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

Id. at 444, 90 S.Ct. at 1194 (citation omitted). Applying this rule to the facts before it, the Court held that in the first prosecution, "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers," and that the

In sum, this court recognizes two principles of collateral estoppel in criminal cases: first, that where a jury's acquittal of a defendant in a first prosecution necessarily was grounded upon its resolution of a particular issue, reprosecution is constitutionally barred where redetermination of the issue would be essential to the defendant's conviction, and second, that the government is collaterally estopped from relitigating the issue even if a contrary resolution is *not* necessary to convict the defendant, but simply would constitute evidence against him or her.

Salamone raised both of these collateral estoppel principles in his pretrial motion as grounds for barring his reprosecution or, alternatively, barring the introduction of evidence that was introduced in *Badalamenti*. The district court summed up his argument as follows:

> [Salamone] asserts that because the Government sought to prove in New York that he obtained, stored, possessed, concealed, transported, and otherwise utilized firearms to facilitate the narcotics and racketeering conspiracies charged in counts 1 and 16 of the New York indictment, it cannot now prosecute him for illegally possessing various firearms and for obtaining and conspiring to obtain firearms by making false statements. In the alternative Salamone argues that the Government cannot now reintroduce the evidence concerning Salamone's allegedly obtaining, storing, possessing, concealing, transporting, or otherwise using firearms that was introduced in his New York trial.

The district court rejected each of Salamone's arguments. It stated first that under both *Ashe* and *Keller*, "the Government is only barred from relitigating issues litigated or reintroducing facts

motion. For the reasons that follow, we will affirm in part and reverse in part.[10]

First, we agree with the district court's determination that Salamone's prosecution in Pennsylvania was not barred under *Ashe*.[11] The theory

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and knowingly join the conspiracy to import, manufacture, and distribute narcotics; (4) did not associate with the alleged criminal enterprise; (5) did not willfully and knowingly conspire with at least one other person to participate in the affairs of the enterprise; or (6) did not commit or conspire to commit at least two racketeering acts.

10. Salamone challenges his conviction on a number of grounds in addition to those involving collateral estoppel principles. Specifically, he argues that (1) the district court judge should have recused himself; (2) the government's evidence regarding the chain of custody of the weapons involved in counts one and two was deficient; (3) the district court erroneously excluded certain evidence; and (4) the district court improperly permitted the government to impeach his credibility through evidence of his partial conviction in New Jersey. We have reviewed each of these arguments and find them lacking in merit.

Salamone also argues that the same three specific categories of evidence to which he objects on collateral estoppel grounds, *see infra*, should have been excluded on the alternative ground that the prejudicial effect of the evidence outweighed its probative value under Fed. R. Evid. 403. To the extent that we hold that portions of this evidence were improperly admitted under principles of collateral estoppel, it becomes unnecessary to address Salamone's Rule 403 argument. With respect to the remainder of the evidence, we reject Salamone's claim of error. Of course, in barring evidence on collateral estoppel grounds we are applying legal precepts and our review is plenary as it is with respect to our determination that reprosecution is not barred.

11. The government maintains that the validity of Salamone's conviction on counts one and two of the Pennsylvania indictment is not in any way called into question under collateral estoppel principles, noting that "[t]he counts relating to possession of an unregistered machine gun were not charged as overt acts in the *Badalamenti* indictment." This observation, although correct, is not dispositive of the collateral estoppel issues; the government did

to participate in the affairs of that enterprise through a pattern of racketeering activity." *Badalamenti* tr. 41,503.

It is evident that the *Badalamenti* jury did not necessarily ground its partial acquittal of Salamone upon the issues which Salamone seeks to foreclose from consideration here--whether he possessed an illegally made and unregistered machine gun, or purchased or conspired to purchase MACs using fictitious names. For instance, the jury could have decided that Salamone committed the substantive crimes charged in this case, yet lacked the requisite intent to participate in the racketeering enterprise.[13] The jury necessarily *did* decide that Salamone was not a member of the narcotics conspiracy;[14] its conviction of numerous other defendants on count one indicates that the other two elements of the offense as charged, that a conspiracy existed and at least one overt act was

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13. With respect to the RICO count, the *Badalamenti* court charged the jury that other elements of the offense included association with the criminal enterprise, and the commission or conspiracy to commit at least two racketeering acts. *Badalamenti* tr. 41,503. As the district court in the instant case recognized, the *Badalamenti* jury also could have determined that although Salamone purchased and conspired to purchase the MACs involved in this case, he did not associate with the criminal enterprise or, alternatively, did not commit or conspire to commit at least two racketeering acts -- the verdict form in *Badalamenti* did not list any acts involving weapons as racketeering acts under Salamone's name.

14. As noted earlier, the district court stated that the jury could have determined that Salamone (1) did not intentionally join the conspiracy; (2) did not have the specific intent to further the conspiracy's illegal purpose; or (3) did not acquire the firearms at issue in this case in order to facilitate the narcotics conspiracy. Whatever analysis was made, the bottom line is the same: the jury found that Salamone was not a member of the narcotics conspiracy.

We, however, rejected defendant's contention. After we noted that there was no need to reconstruct the basis for the acquittal in the first case because the district court had specified its reasons for dismissing the conspiracy count, *id.* at 1197-98, we reasoned:

> it is a prerequisite for the invocation of the doctrine of collateral estoppel that the first acquittal foreclose the possibility that a rational jury might base its verdict in the second prosecution upon a ground other than that decided by the first acquittal. Here, such possibility was not precluded because there is no inconsistency in finding that [defendant] did not participate in a conspiracy having as its object the making of false entries in the Bank's ledgers and in finding that in fact he did make, or cause to be made, such entries.

Id. at 1198.[15]

The court's reasoning in *Pappas* is equally applicable here. We hold that Salamone's prosecution in Pennsylvania was not barred under *Ashe*.

Salamone contends that even if his Pennsylvania prosecution was not barred under *Ashe*, the district court erred in admitting evidence that had been used against him in New York under "doctrinal" collateral estoppel principles. We note first that the district court properly rejected his argument that *any* evidence introduced in New York should have been barred at his subsequent Pennsylvania trial. Because the New York jury did not necessarily decide that Salamone was innocent of possessing an illegally made and unregistered machine gun or falsifying and conspiring

15. *Cf. United States v. DeAngelo*, 138 F.2d 466, 469 (3d Cir. 1943) (acquittal of substantive charge of robbery does not bar separate prosecution for conspiracy to rob; no question of double jeopardy is involved).

note 7. The submission of these transcripts indicates that Salamone found the testimony of these witnesses at his Pennsylvania trial to be objectionable. However, in light of the foregoing discussion, it is clear that the bare fact that Renninger and Wolfe testified in New York regarding, *inter alia*, Salamone's possession of an illegally made and unregistered machine gun does not serve to preclude them from so testifying in Pennsylvania. This seems to be Salamone's only objection to the evidence underlying his conviction on counts one and two of the Pennsylvania indictment. In fact, he never expressly challenges the testimony of these witnesses in his brief on appeal, and at oral argument his attorney conceded that Salamone's conviction on counts one and two raises no collateral estoppel concerns. Accordingly, we will affirm his conviction on these counts.

The fact that an across-the-board ban of any evidence introduced in New York would have been inappropriate, however, does not necessarily mean that the government was permitted to introduce *all* of this evidence. Salamone suggests that even if some of the evidence introduced against him in New York was readmissible in Pennsylvania, the government should have been collaterally estopped from introducing the testimony of certain FBI Agents and testimony regarding certain telephone calls, because in introducing this evidence the government sought to relitigate Salamone's participation in the *Badalamenti* narcotics conspiracy, despite his acquittal of such participation in New York. Brief at 26. The district court did not directly address this argument.

The evidence of this character can be broken down into three categories, two of which we now consider and the third of which we discuss later. First, Salamone objects to the testimony at the Pennsylvania

Pizza and Castronovo's residence; Sal's Pizza and Mazzara's residence; Filippo Salamone's residence and Sal's Place; Filippo Salamone's residence and Ganci's residence; Ganci's residence and the Nutley apartment; Ganci's residence and Castronovo's residence; Ganci's residence and Mazzara's residence; and Castronovo's residence and Two Boys from Italy Restaurant (also owned by Salamone). Tr. 818-21.[16]

Although the record in this case does not contain those portions of the *Badalamenti* transcript consisting of the parallel testimony of these FBI agents and evidence of the telephone calls, there is no dispute that similar evidence was produced by the government at Salamone's New York trial.[17]

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16. The parties entered into a stipulation during Salamone's trial that the foregoing telephone calls had been placed, and the government read the stipulation to the jury in lieu of presenting direct evidence that the calls had been made. Tr. 818. The stipulation was, of course, entered into after the district court's denial of Salamone's motion to exclude evidence on collateral estoppel grounds.

17. We are aware that a number of courts have stated that a criminal defendant has the burden of establishing that collateral estoppel applies by virtue of an issue having been decided in his favor at an earlier trial, and thus has the responsibility of submitting the relevant portions of the record from the prior proceeding. *See, e.g., United States v. Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980); *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480 (1979). However, in the absence of any dispute as to the content of the testimony from *Badalamenti* at issue here, we decline to dispose of Salamone's appeal on the ground that there was inadequate proof of the record from *Badalamenti*. *Cf. United States v. Dowling*, 855 F.2d 114, 121 (3d Cir. 1988) (although "no extrinsic evidence of the record in the earlier case against [defendant] was introduced," the court nonetheless was able to determine that collateral estoppel barred introduction of certain evidence at the second trial). We caution, however, that we by no means condone the seemingly haphazard submission of portions of the transcript from prior proceedings that occurred in this case; the record, although it is

Salamone characterizes the foregoing evidence as establishing that he "was a member of the Mafia, La Cosa Nostra or the Sicilian Brotherhood" involved in the Pizza Connection narcotics conspiracy, brief at 25, and maintains that the government should have been collaterally estopped from introducing the evidence in view of his acquittal in New York on the narcotics conspiracy charge. The government responds that "[t]here is no reference in the record to the Mafia or organized crime, or to drug trafficking." Brief at 40 n.23. Aware that introducing evidence implicating Salamone in the Pizza Connection narcotics conspiracy would be problematic, the government took pains, in its own words, to "sanitize" the evidence in this case, conscientiously avoiding any references to drugs or the Mafia. Tr. 715 (Rule 403 hearing).

Nonetheless, we are constrained to hold that the testimony of FBI agents that various individuals involved in the Pizza Connection case went to and from the three locations where the firearms at issue here were found was improperly admitted, despite the fact that these individuals were never identified as members of the Mafia or as involved in a narcotics conspiracy. Greco, Mazzara, Castronovo and Ganci were not identified by the government as being connected with the instant case in any significant manner *other* than their unexplained association with the three locations where the MACs were found and, by implication, with Salamone.[19] Although Salamone claimed that it was his brother Filippo who purchased the MACs in false names, the government's proof of Filippo's association with the locations where the guns were found does not seem to have been calculated to rebut Salamone's defense.[20] Rather, the inescapable

19. Greco *was* identified as the owner of Sal's Pizza. *E.g.*, Tr. 721.

20. In fact, the government maintains in its brief that "[t]he

Cir. 1987) (where government sought to prove, in second trial, "same ultimate fact" of defendant's involvement in a conspiracy which had been resolved in defendant's favor in first trial, evidence should have been barred under collateral estoppel principles).

It might perhaps be argued that the surveillance testimony was properly allowed because while the jury in *Badalamenti* found that Salamone was not involved in a narcotics conspiracy, its verdict was not necessarily based upon a finding that various individuals who *were* part of the drug ring did not in fact visit the locations where the guns were found, or even that Salamone did not have some kind of suspicious connection with these people, but simply upon a finding that the connection was not narcotics related. However, we believe that drawing such a distinction would run contrary to the principles underlying the case law in this circuit. For instance, in *Keller* we rejected the government's argument that it was not collaterally estopped from introducing evidence of the defendant's participation in a drug transaction, for which participation he had been acquitted, because the defendant did not assert that he had not actually so participated, but only that he had been entrapped. The court stated,

> [To] hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law . . . would eviscerate the effect of the prior acquittal.

Id. at 1160.[21] As one court has explained, the *Keller* court rejected the government's attempt to draw a

21. Similarly in *United States v. Dowling*, 855 F.2d 114, this court held that the government was estopped in a robbery case from

exception of evidence that calls were made between Sal's Place – Salamone's restaurant -- and Sal's Pizza. As explained below, this evidence, as well as the third category of evidence to which Salamone objects, goes *directly* to Salamone's culpability on the charges in the instant case, an issue which the *Badalamenti* jury did not necessarily decide, and therefore was properly admitted.

Although our holding that the evidence just discussed was improperly admitted requires us to reverse Salamone's conviction on counts four through six, as the government does not contend that its admission was harmless and we do not think it was to the extent that it impacted on the verdict on these counts, we will discuss the third category of evidence to which Salamone objects, even though it was properly admitted, as guidance to the parties on remand.

This third general category of evidence consists of the testimony of the three FBI agents who found the MACs that he allegedly bought using fictitious names, along with some of the weapons which he concededly bought in his own name, in the course of executing search warrants of Sal's Pizza, Pizza Village, and the Nutley apartment. Specifically, Agent Gregg Forry testified that on April 9, 1984, while conducting a search of Sal's Pizza, he retrieved an Uzi and a MAC from a duffle bag located in the ceiling of the pizza shop. Tr. 721-28. Agent Ronald Butkiewicz testified that on April 4, 1984, he was involved in a search at Pizza Village during which two MACs were found in a heating duct in the ceiling. Tr. 731-37. Finally, Agent Marc Greenberg testified that on April 9, 1984, in the course of conducting a search of the Nutley apartment, a MAC, two CAR-15s, and a box containing ammunition were found in the attic.[23] Tr. 740-44.

23. The weapons that the agents testified they found had previously been identified as those which Salamone was alleged to

properly admitted. *See Pappas.*[25]

We also note the following with respect to an issue suggested by the facts but not raised on appeal. The government concedes that the same activity, acquisition of firearms, gave rise to both Mr. Salamone's trial in New York on conspiracy charges[26] and his separate trial in Pennsylvania on the substantive firearm counts (Brief at 17, 19). This presents a question as to whether Mr. S mone was subjected to separate or multiple prosecutions for the same activity/offense in violation of the Double Jeopardy Clause of the Fifth Amendment. *See Brown v. Ohio*, 432 U.S. 161, 166-67 n.6, 97 S.Ct. 2221, 2226 n.6 (1966); *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912 (1977) (per curiam); *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672 (1889). On appeal, Mr. Salamone relied exclusively on the collateral estoppel aspect of double jeopardy. *See Ashe v. Swenson*, 397 U.S. at 437-40, 90 S.Ct. at 1191-92. Therefore, collateral estoppel is the only aspect of double jeopardy with which we deal.

> *necessarily* rejected by the first jury. While it is all relevant to the conspiracy of which Hall was acquitted, it does not go to the particular element -- agreement -- that the jury must have found lacking. Rather, the evidence is relevant to Hall's participation in the actual importation. As this element was not decided in his favor at the first trial, Hall's conviction is not due to be overturned on collateral estoppel grounds.

Id. at 1406-07.

25. To the extent that Salamone objects to testimony by Renninger tending to establish that Salamone purchased the MACs at issue here on the ground that Renninger gave similar testimony in *Badalamenti*, we reject his argument for the same reasons.

26. In New York, it was alleged that acquisition of the firearms, in addition to money laundering, was performed in furtherance of a drug trafficking conspiracy and racketeering enterprise.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5803

UNITED STATES OF AMERICA,

Appellee

v.

SALVATORE SALAMONE,

Appellant

On Appeal from the United States District
Court for the Middle District
of Pennsylvania
Criminal No. 84-00150

Argued January 18, 1989

BEFORE: GIBBONS, Chief Judge,
and SEITZ and GREENBERG,
Circuit Judges

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed March 6, 1989, be amended as follows:

On page 10, replace the last sentence of the text with the following sentence:

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal No. 84-00150-01
SALVATORE SALAMONE	:	(Judge Muir)

ORDER
August 19, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 15, 1987, Salvatore Salamone filed a motion to dismiss the indictment or in the alternative to prohibit the introduction of evidence on the basis of collateral estoppel and an affidavit and brief in support of the motion. The Government filed a responsive brief on July 28, 1987. Counsel for Salamone informed the Court on July 31, 1987, that no reply brief would be forthcoming and the matter became ripe on that date.

On December 27, 1984, a grand jury sitting in the Middle District of Pennsylvania returned a 7-count indictment against Salvatore Salamone charging him with (1) possession of an illegally made firearm in violation of 26 U.S.C. §5861(c); (2) possession of an unregistered firearm in violation of 26 U.S.C. §5861(d); (3) transfer of the illegal, unregistered weapon in violation of 26 U.S.C. §5861(e); (4) conspiracy to falsify firearm records in violation of 18 U.S.C. §371; and (5) three counts of falsifying firearm records in violation of 18 U.S.C. §924(a).

facilitating the narcotics distribution and money laundering activities by obtaining, storing, possessing, concealing, and transporting and otherwise utilizing firearms. Indictment, United States vs. Badalamenti, page 110. On March 2, 1987, Salamone was acquitted on Count 1 and Count 16 in United States vs. Badalamenti.

Salamone argues that the doctrine of collateral estoppel bars the Government from prosecuting him for the firearms violations charged in the indictment pending in this Court. We note that except for two short paragraphs the argument section of Salamone's brief is a verbatim extract from United States vs. Crispino, 586 F.Supp. 1525, 1528-1531 (D. N.J. 1984), without attribution. He asserts that because the Government sought to prove in New York that he obtained, stored, possessed, concealed, transported, and otherwise utilized firearms to facilitate the narcotics and racketeering conspiracies charged in Counts 1 and 16 of the New York indictment, it cannot now prosecute him for illegally possessing various firearms and for obtaining and conspiring to obtain firearms by making false statements. In the alternative Salamone argues that the Government cannot now reintroduce the evidence concerning Salamone's allegedly obtaining, storing, possessing, concealing, transporting, or otherwise using firearms that was introduced in his New York trial.

The doctrine of collateral estoppel as applied to criminal cases extends the prohibition against multiple

To determine whether a rational jury in United States vs. Badalamenti grounded its verdict with respect to Counts 1 and 16 of the indictment upon a finding that Salamone did not obtain, store, possess, conceal, transport, or otherwise utilize firearms or whether the Government is attempting to prove an issue or fact that was already decided in Salamone's favor, we must "...examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." Hill, 550 F.Supp. at 987 (quoting Ashe vs. Swenson, 397 U.S. 436, 444 (1970)).

Salamone submitted the indictment and testimony and an exhibit index relating to firearms evidence in United States vs. Badalamenti for our examination. The Government submitted the instructions to the jury given in United States vs. Badalamenti and the instructions we gave in the first trial of United States vs. Salamone. We have thoroughly reviewed all of these documents.

On the basis of the jury's verdict and our review of the evidence and charge in United States vs. Badalamenti submitted to us, it is impossible to determine whether the evidence with respect to firearms was actually decided in favor of or against Salamone. The jury could have acquitted Salamone on the narcotics and racketeering conspiracies without giving any consideration to the issues and facts concerning firearms. The Court in United States vs.

respect to firearms. Collateral estoppel is inapplicable in situations where the Court cannot determine whether the evidence and issues the Defendant seeks to bar were actually decided in the Defendant's favor. United States vs. Hill, 550 F.Supp. 983 (E.D. Pa. 1982), aff'd, 716 F.2d 893 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984). A finding by this Court that a rational jury in United States vs. Badalamenti must have rejected the firearms evidence in reaching its verdict of not guilty on Counts 1 and 16 would be mere speculation. We conclude that Salamone's acquittal on Counts 1 and 16 in United States vs. Badalamenti does not foreclose the possibility that a rational jury might base its verdict in this case on issues and facts other than those decided in United States vs. Badalamenti.

NOW, THEREFORE, IT IS ORDERED THAT:

Salamone's motion to dismiss the indictment or in the alternative to prevent the reintroduction of evidence, filed July 15, 1987, is denied.

MUIR, U.S. District Judge

MM:tb

APPENDIX E

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5803

UNITED STATES OF AMERICA

vs.

SALVATORE SALAMONE, Appellant

(D.C.Criminal No. 84-00150)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA - SCRANTON

Present: GIBBONS, Chief Judge, SEITZ and GREENBERG, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania, Scranton and was argued by counsel January 18, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 3, 1987, be, and the same is hereby affirmed insofar as the convictions and sentences on counts one and two, and vacated insofar as the convictions and sentences on counts four, five and six. The cause will be remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:
Clerk

March 6, 1989

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	CRIMINAL NO. 84-00150
vs.	:	
	:	(Judge Muir)
	:	
SALVATORE SALAMONE	:	

FILED
LEWISBURG, PA.
SEP 21 1987
DONALD R. BERRY, CLERK
PER
DEPUTY CLERK

ORDER

September 21, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The above-captioned case is currently being tried by this Court in Lewisburg, Pennsylvania. The trial began on September 21, 1987. A few minutes prior to the start of the trial, Salamone filed a "Supplemental Motion to Prohibit the Introduction of Specific Evidence on the Basis of Collateral Estoppel or in the Alternative on the Basis of Fed. R. Crim. P. 403." No brief in support has been filed by Salamone; however, the Government filed a response on September 21, 1987.

By Order of August 19, 1987, we denied Salamone's "Motion to Dismiss Indictment or in the Alternative to Prohibit the Introduction of Evidence on the Basis of Collateral Estoppel." For the same reasons stated therein, we shall deny the motion currently before us. We shall also deny Salamone's alternative motion pursuant to Fed.R.Crim.P. 403 without prejudice. We are not aware of any such rule.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5803

UNITED STATES OF AMERICA,

Appellee

v.

SALVATORE SALAMONE,

Appellant

(D.C. Crim. No. 84-00150)

SUR PETITION FOR REHEARING

BEFORE ORIGINAL PANEL

Before: GIBBONS, Chief Judge, SEITZ and GREENBERG, Circuit Judges

The petition for panel rehearing filed by United States of America, Appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

DATED: APR 27 1989